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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/705,341

11/10/2003

Adriano Festa

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04/25/2006

AKERMAN SENTERFITT

P.O. BOX 3188

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EXAMINER

PEARSE, ADEPEJU OMOLOLA

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 04/25/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/705,341

Applicant(s)

FESTA ET AL.

Examiner

Adepeju Pearse

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 07 March 2006.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1 and 3-11 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1 and 3-11 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)             | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)    | Paper No(s)/Mail Date. _____  |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____   | 6) <input type="checkbox"/> Other: _____                                    |

**DETAILED ACTION**

***Claim Rejections - 35 USC § 112***

1. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

2. Claim 11 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter, which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The claim recites reducing to cream a part of the organoleptically characterizing ingredient. This is an essential step in the process; however, the specification does not teach how to form the cream or what ingredients are used to form the cream. One skilled in the art would not know how to make the cream from reading the specification.

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter, which the applicant regards as his invention.

2. Claim 11 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Applicant discloses the addition of optional ingredients. It is unclear what constitutes these optional ingredients.

***Response to Arguments***

1. Applicant's arguments with respect to claims 1 and 3-11 have been considered but are moot in view of the new ground(s) of rejection. Applicant argues that the teaching of Ammedick-Naumann of utilizing vegetable powder at 50% would not be obvious to one of ordinary skill in the art. However, "when, as by a recitation of ranges or otherwise, a claim covers several compositions, the claim is anticipated' if one of them is in the prior art." *Titanium Metals Corp. v. Banner*, 778 F.2d 775, 227 USPQ 773 (Fed. Cir. 1985) (Citing *In re Petering*, 301 F.2d 676, 682, 133 USPQ 275, 280 (CCPA 1962)) (See MPEP 2131.03).
2. Applicant argues that the teaching of Ammedick-Naumann does not relate to a food composition to be used as a sauce base. However, Ammedick positively states, "the foodstuff composition is suitable in particular for use as a sauce aid" (col 2 lines 38-39). It would be obvious to one of ordinary skill in the art to utilize this composition in a sauce base as instantly claimed because it improves the stability.
3. Applicant also states that the instant application does not require the inclusion of any added emulsifiers and/or thickeners. However, the claim language does not exclude these ingredients.
4. Regarding claim 11, applicant argues that the applied references do not teach a method of providing a sauce base base, which comprises vegetable ingredients in both creamy and particulate form. However, it is well known in the art to have this combination as evidenced by the creamy corn recipe discussed below.
5. In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the

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teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Kuil et al disclose a sauce concentrate utilizing similar ingredients as instantly claimed but at different compositions as in the organoleptically ingredient. Ammedick-Naumann et al teach a sauce aid that is particularly suitable for sauces containing an organoleptically ingredient i.e. vegetable ingredients as instantly claimed at the disclosed range. It would be obvious to one of ordinary skill in the art to modify Kuil et al with Ammedick in order to provide stability to the sauce base by the teachings taught by Ammedick-Naumann.

***Claim Rejections - 35 USC § 103***

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

3. Claims 1 and 3-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kuil et al in view of Ammedick-Naumann et al (US Pat. No. 6,254,918) and Blaker et al (US 2003/0129292). With regard to claim 1, Kuil et al disclose a soup and sauce concentrate that is ambient stable having a water activity of below 0.92 (abstract) comprising 5-65% of fat or oil, 1-35% of a flavoring composition that includes vegetables (col 1 lines 58-64, col 3 lines 7-12) and

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a pH preferably less than 5.0 (col 2 lines 49-59). However, Kuil et al failed to disclose an organoleptically characterizing ingredient in a range, of 50-70%. Ammedick-Naumann et al teach a sauce aid comprising of food grade oil, a finely divided vegetable powder containing cell wall and/or fiber (abstract) at a range of 10-50% (col 1 lines 60-62); this range encompasses applicant's recited range. It would be obvious to one of ordinary skill in the art to modify Kuil et al with the teaching of Ammedick-Naumann in order to help stabilize the sauce. In addition it is well known to incorporate vegetables at high percentages in sauce as evidenced by Blaker et al wherein tomato puree is utilized in a spaghetti sauce at 64% (0128), which is within applicant's recited range.

4. With regard to claim 3, Kuil et al disclose a most preferred water activity between 0.7 and 0.9 in order to increase microbial stability at ambient conditions (col 2 lines 49-52) this range encompasses applicant's recited range. It would be obvious to one of ordinary skill in the art to expect a lower water activity in order to increase microbial stability.

5. With regard to claim 4, Kuil et al disclose a pH less than 5 and more preferably at least 4.0 (col 2 lines 53-56) for microbial stability. This range encompasses applicant's recited range. It would be expected that the pH would be at this level in order to improve the stability of the soup concentrate.

6. With regard to claims 5-6, Kuil et al failed to disclose the types of edible oils incorporated in the soup concentrate. However, Ammedick-Naumann et al teach suitable food grade oils including olive oil, soybean oil, etc. It would be obvious to one of ordinary skill in the art to modify Kuil et al with the teaching of Ammedick-Naumann and expect that these oils have low saturated fatty acid content as instantly claimed because they are food grade oils.

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7. With regard to claim 7, Kuil et al disclose that herbs and spices can be incorporated into the soup concentrate (col 3 lines 7-10).

8. With regard to claim 8, Kuil et al disclose that the vegetables incorporated in the soup or sauce base are chopped components including mushrooms, tomatoes, etc (col 3 lines 11-15).

9. With regard to claims 9-10, Kuil et al disclose that the concentrated base product could be mixed/diluted with an aqueous liquid such as water, milk, cream vegetable juices etc in order to prepare a ready-to-eat finished sauce (col 3 lines 40-50).

10. Claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kuil et al in view of Blaker et al (US 2003/0129292) and Moses ([www.fatfree.com](http://www.fatfree.com)). Kuil et al disclose a soup and sauce concentrate that is ambient stable having a water activity of below 0.92 (abstract) comprising 5-65% of fat or oil, 1-35% of a flavoring composition that includes chopped vegetables (col 1 lines 58-64, col 3 lines 7-15) and a pH preferably less than 5.0 (col 2 lines 49-59). However, Kuil et al failed to disclose an organoleptically characterizing ingredient in a range, of 50-70%. It is well known to incorporate vegetables at high percentages in sauce as evidenced by Blaker et al wherein tomato puree is utilized in a spaghetti sauce at 64% (0128), which is within applicant's recited range. Kuil et al failed to disclose the step of subjecting the organoleptically ingredient to a mild heat treatment and reducing it to cream. Blaker et al teach the process of preparing a sauce comprising the steps of heating diced tomatoes to a temperature of 60-120°C, followed by concentration e.g. water removal by evaporation (0054). Moses teaches a recipe for preparing a creamy corn soup comprising forming a mixture comprising some corn, broth, milk, onion and pureed a blender until smooth. Then the remaining corn is

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added to the mixture. The mixture is then reheated. It would be obvious to one of ordinary skill in the art to modify Kuil et al with the teachings of Blaker et al and Moses in order to provide a sauce that is microbiologically stable because of its low pH and water activity, which is similar to applicant's recited pH, and water activity.

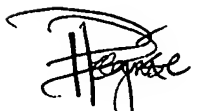
***Conclusion***


11. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Prior art discloses similar subject matter.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Adepeju Pearse whose telephone number is 571-272-8560. The examiner can normally be reached on Monday through Friday, 8.00am - 4.30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
Peju Pearse

  
CAROLYN PADEN 4.24.06  
PRIMARY EXAMINER 1761